IN THE SUPREME COURT OF THE STATE OF DELAWARE

DORIAN D. WAINER,	§	
	§	No. 280, 2004
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0304002154
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: November 10, 2004
Decided: February 15, 2005

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

O R D E R

This 15th day of February 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. The defendant below-appellant, Dorian Wainer, appeals from a Superior Court sentence, imposed after a jury found Wainer guilty of Sexual Solicitation of a Minor. Wainer advances two claims on appeal. First, he contends that the Superior Court erred in refusing to grant a mistrial, asserting that the jury was prejudiced by evidence related to a drug charge on which Wainer was acquitted. Second, Wainer claims that the Superior Court erred by refusing to give the jury a "missing evidence" instruction. Because neither claim has merit, we affirm both of the Superior Court rulings.

2. Wainer was tried in the Superior Court for Sexual Solicitation of a Child, Endangering the Welfare of a Child, and Burglary. Those charges stemmed from an April 3, 2003 incident in which Wainer entered the home of Brooke Hollis and Lisa Hollis, while Brooke was at home with her babysitter, Janice Baker.

3. At the time of the incident, Brooke was eleven years old. Baker was staying at home with Brooke while Brooke's mother, Lisa, was at work. Wainer entered the house uninvited, and asked Brooke to have sex with him if he paid her. While he was inside the house but outside Brooke's presence, Wainer also removed a clear pipe, a "Brillo pad" and a white rock-like substance from a plastic bag in his possession, and he then attempted to smoke the rock-like material. Based upon that conduct, the State charged Wainer with Sexual Solicitation and Burglary and with Endangering the Welfare of a Child.

4. At the close of the State's evidence, the trial judge granted Wainer's motion for judgment of acquittal on the charge of Endangering the Welfare of a Child. The trial judge found that the State had not shown that Wainer had consumed drugs in Brooke's presence.

5. At the conclusion of the trial, the jury found Wainer guilty of Sexual Solicitation of a Child, but was unable to reach a verdict on the Burglary charge. The Superior Court sentenced Wainer for Sexual Solicitation of a Child. Wainer appeals from that sentence.

6. On appeal, Wainer first argues that the trial judge abused his discretion by denying his motion for a mistrial. Second, he claims that the trial judge erred by refusing to give a "missing evidence" instruction to the jury.

7. Before trial, the Superior Court denied Wainer's motion to dismiss the Child Endangering charge. During the trial, Brooke, Hollis and Baker all testified that while Wainer was inside the house, he tried to smoke the rock-like substance, but was unable to light the material. Based on that evidence, the judge granted Wainer's motion for acquittal on that charge, finding that the State had not proved all the elements of the charged offense.

The Mistrial Motion

8. After that acquittal motion was granted, Wainer moved for a mistrial, arguing that the drug evidence had prejudicially "tainted" the remaining counts and that the prejudice was incurable. The judge denied the motion for a mistrial, and instructed the jury that it should not consider the dismissed Child Endangering charge. Wainer's counsel declined the judge's offer to consider giving additional jury instructions on that issue.

9. This Court reviews the denial of a motion for mistrial for abuse of discretion.[1] A curative instruction will almost always be sufficient to remedy whatever prejudice may result from the admission of inadmissible evidence.[2] "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'"[3]

10. Wainer claims that by refusing to grant a mistrial, the Superior Court abused its discretion. He argues that the evidence of his alleged drug use prejudiced the jury's ability to consider impartially the remaining charges against him. Specifically, Wainer argues that the jury concluded that he was "a person of bad character," based on the evidence that he had used drugs in Brooke's presence. That argument fails because the State presented sufficient evidence, unrelated to the drug-related testimony, to support the jury verdict on the Sexual Solicitation charge. Furthermore, the jury's inability to convict Wainer of the Burglary charge demonstrates that the jurors were able to consider the evidence rationally and without bias. Because Wainer did not demonstrate that granting a mistrial was a "manifest necessity," the Superior Court did not abuse its discretion in denying his motion for a mistrial.

---

[1] *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003); *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

[2] *Id*. (quoting *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993)).

[3] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (quoting *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974).

The Jury Instruction Motion

12. Wainer's second claim relates to certain handwritten notes that the investigating officer destroyed after writing his police report. Wainer contends that the trial judge erred by refusing to give a "missing evidence" instruction, *i.e.*, an instruction that the jury should infer that the notes would have been exculpatory to the defendant had the State preserved them. This Court reviews *de novo* the Superior Court's denial of a requested jury instruction.[4]

13. Jeffrey Melvin, the police officer who initially investigated the complaint against Wainer, testified that after he wrote the police report he destroyed the notes he had taken during his interviews of Baker and of Lisa and Brooke Hollis. On that basis, Wainer requested a missing evidence jury instruction—commonly known as a "*Deberry* instruction"—that would require the jury to presume that the missing notes were exculpatory.

14. In *Deberry v. State*,[5] this Court held that the State is obligated, as a matter of due process, to preserve evidence that is material to a defendant's guilt or innocence.[6] *Deberry* established the test for determining whether exculpatory

[4] *Gutierrez v. State*, 842 A.2d 650, 651 (Del. 2004); *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998).

[5] *Deberry v. State*, 457 A.2d 744, 754 (Del. 1983).

[6] *Id.*

evidence has been lost or destroyed.[7] In reviewing a claim that the State lost or destroyed exculpatory evidence, this Court must consider: (i) whether the requested material would have been subject to disclosure under Criminal Rule 16 or *Brady v. Maryland*;[8] (ii) if so, whether the government had a duty to preserve the material; and (iii) if so, whether the State breached that duty and what consequences should flow from the breach.[9]

15. We assuming without deciding that the first two factors were established, *i.e.*, that the handwritten notes would have been discoverable under Criminal Rule 16[10] and that the police had a duty (which they breached) to preserve the notes.[11] The issue then becomes the third *Deberry* factor, which requires us to consider the consequences that should flow from that breach. In assessing those consequences, this Court considers: (i) the degree of negligence or bad faith in the State's conduct, (ii) the importance of the missing evidence, and

---

[7] *Lunnon*, 710 A.2d at 199.

[8] 373 U.S. 83 (1963). *Brady* requires the prosecution to turn over potentially exculpatory evidence to the defendant, upon request. *Id*. at 87

[9] *Lunnon*, 710 A.2d at 199-200 (quoting *Deberry*, 457 A.2d at 750).

[10] The State does not concede that the notes would have been discoverable, and presents a viable argument that in fact the statements were not discoverable. Because Wainer has not shown that the destruction of the notes was prejudicial, however, this Court need not reach the issue of whether the notes were discoverable.

[11] The trial judge found that the police officer did have a duty to preserve the notes, and that he failed to do so.

(iii) the sufficiency of the evidence presented at trial to support the conviction.[12] If under that analysis the State fails to preserve evidence that is material to the defense, the defendant is entitled to a missing evidence instruction.[13]

16. Here, Wainer has not shown that the State destroyed evidence that was material to his defense. Even if it is assumed that Officer Melvin negligently failed to preserve the interview notes, there is no evidence that he did so in bad faith.[14] Nor is there evidence that the defendant's case was prejudiced by the missing notes, because the trial judge found that the police report incorporated the substance of the notes and was written the same day the interviews were conducted. The judge further found no evidence indicating that the substance of the notes was exculpatory. Lastly, the evidence presented at trial was sufficient to support the jury verdict. All three persons whom Officer Melvin had interviewed testified at trial and were cross-examined by Wainer's counsel. Nothing of record indicates that those witnesses' stories changed between the interview and the trial. In short, the notes were not material to establish Wainer's defense.

---

[12] *Lunnon*, 710 A.2d at 200.

[13] *Lolly v. State*, 611 A.2d 956, 961-62 (Del. 1992).

[14] This Court has rejected the federal standard that a defendant must show bad faith on the part of the police in order to prevail in a claim for lack of due process. Although it is not the determinative factor, the conduct of the State's agent is still a relevant consideration. *Lolly*, 611 A.2d at 960.

17. In *Lunnon v. State*,[15] this Court held that where, as here, the State does not act negligently or in bad faith in failing to preserve evidence, and the missing evidence does not substantially prejudice the defendant's case, a *Deberry* instruction is not necessary. At most, Wainer has shown that the destruction of the notes was negligent, but he has not shown bad faith, prejudice, or insufficient evidence. Accordingly, the Superior Court properly denied Wainer's request for a missing evidence instruction.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[15] *Lunnon*, 710 A.2d at 200-01.